No. 01-6978

Supreme Court U.S.
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IN THE

Supreme Court of the United States

GARY ALBERT EWING,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal for the State of California Second Appellate District

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Because much of the briefing submitted by respondent and its amici fails to address the question presented, it is important to emphasize what this case is, and is not, about. This case is not about whether a defendant's prior criminal record can be considered in imposing sentence for the current crime. Clearly, it can be. *E.g.*, *Witte v. United States*, 515 U.S. 389 (1995).

This case is also not about whether all recidivist statutes are unconstitutional. Clearly, they are not. *See Spencer v. Texas*, 385 U.S. 554, 559 (1967). For example, there could be no serious Eighth Amendment challenge to the federal "Three Strikes" law, 18 U.S.C. § 3559(c), which reserves a sentence of life without parole for those who commit a "serious violent felony" after having been convicted of two or more equally serious felonies. *See Solem v. Helm*, 463 U.S. 277, 299 n.26 (1983).

Nor is this case about the constitutionality *vel non* of the California Three Strikes law. Application of that law to repeat offenders who commit a violent or otherwise serious felony would not result in a constitutionally excessive sentence.

Instead, this case is about Mr. Ewing's constitutional challenge, like that of the defendant in *Helm*, to "his own sentence." 463 U.S. at 299 n.26. Specifically, petitioner challenges his sentence of life imprisonment with no possibility of parole for a minimum of twenty-five years, for a crime—stealing three golf clubs—that the State itself designates as neither serious nor violent. Even accounting for petitioner's recidivism, this application of the Three Strikes law has produced a sentence that is grossly disproportionate to Mr. Ewing's offense, and is therefore unconstitutional.[1]

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[1] The success of Mr. Ewing's Eighth Amendment challenge to his sentence will not void the California Three Strikes law. The California law specifically provides that if the law's application to any person is held

I. ALL CRIMINAL SENTENCES ARE SUBJECT TO JUDICIAL REVIEW FOR GROSS DISPROPORTIONALITY

This Court has held that the Eighth Amendment forbids "extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., conc.) quoting *Helm*, 463 U.S. at 288, 303. Respondent and its amici would effectively write this Eighth Amendment protection out of the vast majority of cases. They suggest that if the punishment imposed on a repeat offender is other than death or life imprisonment without possibility of parole, it cannot be excessive. They base this argument not on any limiting language in the Eighth Amendment, but on the suggestion that evaluating the disproportionality of sentences is judicially unmanageable and inconsistent with the deference owed to state legislatures. *See* U.S. amicus Br. 11, 18-19; Resp. Br. 21-22.

The Court should reject this argument. First, the Eighth Amendment's proscription against cruel and unusual punishment and excessive fines applies to all sentences: "no penalty is *per se* constitutional." *Helm*, 463 U.S. at 290. Thus, the Court has held that fines and punitive forfeitures in criminal cases are subject to judicial review under the Eighth Amendment. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish"). Similarly, the Court has held that punitive damages in civil cases must be reviewed for excessiveness under the Due Process Clause. *BMW v. Gore*, 517 U.S. 559, 562 (1996). It would be anomalous, to say the least, if the Constitution required courts to protect individuals and corporations against

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invalid, that invalidity shall not affect any other application. See Cal. Penal Code § 667(i).

constitutionally excessive penalties affecting their pocketbooks, but left those courts powerless to evaluate whether imprisonment for a fixed term of years, potentially extending to life in prison, was excessive, no matter how slight the triggering offense or pattern of recidivism. *See Helm*, 463 U.S. at 289 ("It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not"); *id.* at 295 ("a court properly may distinguish one sentence of imprisonment from another").

Second, concerns of deference and manageability provide no basis for creating an exception to the Eighth Amendment for minimum-term sentences. In arguing to the contrary, respondent and amicus United States overlook that it was these two factors that led the Court to *adopt* the highly deferential and structured "gross disproportionality" standard itself, rather than, for example, a more intrusive standard that would have required that all sentences be strictly proportional to the underlying offense. *See, e.g., Harmelin*, 501 U.S. at 1001 (Kennedy, J., conc.); *Bajakajian*, 524 U.S. at 330-31.

Application of *Helm* and *Harmelin* to date further belies the State's arguments for diluting the Eighth Amendment. As of August 21, 2002, a Lexis search of federal and state cases decided during the almost twenty years since *Helm* reveals 2,592 cases which cited the decision. In only eleven of those cases, however, was the sentence held to be unconstitutional under *Helm*, and only three of these eleven were federal cases.[2] The analysis set forth in *Helm* and *Harmelin* thus has

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[2] The federal decisions are *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001); *Andrade v. Attorney General*, 270 F.3d 743 (9th Cir. 2001), *cert. granted sub nom. Lockyer v. Andrade*, 122 S.Ct. 1434 (2002); *Brown v. Mayle*, 283 F.3d 1019 (9th Cir. 2002), *cert. petition filed Mar. 7, 2002*. The state court decisions are *Ashley v. State*, 539 So.2d 1181 (Miss. 1989); *State v. Hedrick*, 391 S.E.2d 614 (W. Va. 1990); *State v. Bartlett*, 792 P.2d 692 (Ariz. 1990), *cert. granted, vacated and remanded*, 501 U.S.

evolved as a stringent test that has proved neither unworkable nor unduly intrusive on state interests.

The Court also should reject the State's related request that greater deference be accorded Mr. Ewing's sentence because it was mandated by statute, rather than chosen by the sentencer from a range of statutory alternatives. The Eighth Amendment's ban on cruel and unusual punishments is directed to the penalty actually imposed, regardless of whether it was mandated by the legislature or merely authorized within a range of statutory alternatives. *E.g.*, *Roberts v. Louisiana*, 428 U.S. 280 (1976) (mandatory penalty cruel and unusual); *Coker v. Georgia*, 433 U.S. 584 (1977) (discretionary penalty cruel and unusual).[3] In any event, every sentence that comes before the Court for review under the Eighth Amendment has effectively been authorized by the Legislature. A legislatively-authorized sentence that is grossly disproportionate to the offense of conviction cannot stand merely because the legislature made its imposition mandatory.

1246 (1991); *People v. Gaskins*, 923 P.2d 292 (Colo. Ct. App. 1996); *People v. Medina*, 926 P.2d 149 (Colo. Ct. App. 1996); *State v. Bonner*, 577 N.W.2d 575 (S.D. 1998); *State v. Jackson*, 797 So. 2d 33 (La. 2001); *Wilson v. State*, 2001 Ala. Crim. App. LEXIS 182 (2001)

[3] It is true that, in *Helm*, the Court noted that "we do not question the legislature's judgment." 463 U.S. at 299 n.26. It did so, however, only in the context of noting that Helm was not challenging the constitutionality of the South Dakota recidivist statute *per se*: "Helm, however, has challenged only his own sentence. No one suggests that § 22-7-8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals." *Id.*

Respondent's reliance on statements from the plurality opinion in *Harmelin* is also misplaced. The statements were not addressed to Harmelin's claim that the sentence imposed was excessive, but rather to his separate attack on the "mandatory nature" of his sentence," *i.e.*, that "any severe penalty scheme required individualized sentencing so that a judicial officer may consider mitigating circumstances." *Harmelin*, 501 U.S. at 1006.

Furthermore, even assuming, *arguendo*, that a sentence mandated by the legislature merited greater deference than a sentence chosen by a judge, such added deference would still be misplaced in this case. As the State necessarily concedes, "[t]he statute preserves an opportunity for judicial discretion to avoid a life sentence." Resp. Br. 33. To the extent that the sentencing court refused to exercise that discretion in Mr. Ewing's case, Mr. Ewing's sentence was the choice of the court, not the legislature.[4]

Indeed, the nature and history of California's Three Strikes law reveals that this law deserves, if anything, a lesser degree of deference than would be afforded other laws. First, judicial oversight is particularly warranted because the Three Strikes law cannot be amended except by ballot initiative or by vote of a super-majority of the legislature. *See* Amicus Br. of Families to Amend California's Three Strikes Law et al., submitted in *Lockyer v. Andrade*, No. 01-1127 at 8-10. Second, the Three Strikes law was not the product of a typical

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[4] Since Mr. Ewing was denied such relief, respondent's discussion of a California court's power to reduce a wobbler to a misdemeanor (Resp. Br. 27-28) or to strike a prior conviction for purposes of sentencing (Resp. Br. 33-35) is beside the point. In any event, the sentencer's discretion to strike priors under *People v. Superior Court (Romero)*, 13 Cal.4th 497 (1996), does little to ensure proportionality. First of all, rather than the "broad" discretion stated by amicus United States (U.S. Amicus Br. 4), the California Supreme Court has stated, "we emphasize the following: a court's discretion to strike prior felony convictions in furtherance of justice is *limited*." *Romero*, 13 Cal.4th at-530 (emphasis added).

This cautionary admonition from the State's highest court may explain why judicial recognition of the power to strike priors has not significantly reduced the large percentage of California "three-strikers" whose commitment offense is a property crime. *See* Amicus Curiae Brief of the Public Defender of Los Angeles County, filed in *Lockyer v. Andrade*, No. 01-1127. Indeed, when it comes to Mr. Ewing's commitment offense, grand theft, in the six years since the *Romero* decision, there has actually been a slight increase in the number of grand theft "three-strikers" as a percentage of the total "three-striker" population. *Id.*, at 18, 20.

legislative process, with committee hearings, testimony by criminal justice system experts, fine-tuning by amendments, and other traditional measures to test the soundness of proposed legislation. *Id.*, at 5-7. Rather, written by the father of a murder victim and sponsored by the prison guards union and the National Rifle Association, it sailed through the legislative and the initiative process, in the aftermath of a particularly notorious crime and in the heat of a highly contested gubernatorial campaign. *Id.* For that reason as well, the Three Strikes law would appear to merit less deference than a more well-considered sentencing scheme, such as the United States Sentencing Commission Sentencing Guidelines or California's own Determinate Sentencing Law.

But in all events, neither the State nor its amici have advanced any valid reason for sidestepping or weakening the constitutional protection against grossly disproportionate sentences involving a term of years. The Court should therefore apply the *Harmelin* standard and evaluate whether Mr. Ewing's sentence is grossly disproportionate to his offense.

II. PETITIONER'S RECIDIVISM DOES NOT JUSTIFY A SENTENCE OF TWENTY-FIVE YEARS TO LIFE IN PRISON FOR SHOPLIFTING

Respondent and its amici cannot and do not argue that, under the *Harmelin* rule, Mr. Ewing's sentence of twenty-five-years-to-life is a constitutionally acceptable punishment for shoplifting. Such a sentence is grossly disproportionate to the relatively small "magnitude" of, and absence of "violence" in, petitioner's property crime. *Helm*, 463 U.S. at 293, 296.[5] Rather, the State and amicus United States attempt

[5] It is undisputed that the amount in question, although over the threshold for grand theft, was less than $1,200. *Cf. Helm*, 463 U.S. at 293 ("Stealing a million dollars is viewed as more serious than stealing a hundred dollars").

to defend the extraordinary harshness of Mr. Ewing's sentence by pointing to his prior criminal record.

This Court has previously rejected the argument that proportionality is determined by reference to the defendant's prior record, rather than to the defendant's current offense. Shoplifting, regardless of the offender's prior record, is still only shoplifting, and a constitutional sentence must reflect that basic fact.

Petitioner concedes, of course, that a prior record can justify some enhancement of the sentence for petitioner's current offense. *See* Pet. Br. 29. But as the Court's prior rulings make abundantly clear, the focus of the inquiry into gross disproportionality must remain upon the current offense. Nowhere does the State or amicus United States convincingly explain how a sentence of twenty-five-years-to-life can fairly be considered an "enhancement" of the state-prescribed penalty for shoplifting.

In particular, neither the State nor amicus United States contests the basic principle that the Double Jeopardy Clause precludes a state from punishing a defendant twice for the same crime. *North Carolina v. Pearce*, 395 U.S. 711, 717-18 (1969); *Brown v. Ohio*, 432 U.S. 161, 169-70 (1977). For

Respondent's amici hypothesize about the possibilities of theft escalating into potentially violent incidents. U.S. Amicus Br. 17-18 n.8; CDAA Amicus Br. 27-28. However, grand theft in the abstract—and particularly Mr. Ewing's grand theft—poses no threat of violence, as the Legislature recognized when setting the penalties for that offense. Indeed, the significance of the fact that grand theft is a "wobbler"—which the State and its amici misconstrue—is that it reflects the Legislature's judgment that the nature and relative severity of grand theft, unlike most felonies, is such that treatment as a misdemeanor can be appropriate in some cases (and likely would have been in this case, absent defendant's prior record). Moreover, should violence somehow ensue following grand theft, the defendant can properly be charged with appropriate, more serious crimes, such as robbery, for which the Legislature has established harsher penalties. *See* CDAA Amicus Br. 27.

this reason, when the Court has approved recidivist statutes, it has made clear that their validity depends upon the defendant "being punished only for the offense of conviction." *Witte*, 515 U.S. at 402; *see also Gryger v. Burke*, 334 U.S. 728, 732 (1947). Accordingly, while a state has broad latitude to adopt enhanced sentences for repeat offenders, *see Parke v. Raley*, 506 U.S. 20, 27 (1992), a sentence under a recidivist law will pass constitutional muster only as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger*, 334 U.S. at 732; *see also McDonald v. Massachusetts*, 180 U.S. 311, 312 (1901). The Court has therefore ruled that, when a sentence imposed under a recidivist statute is evaluated for proportionality, although the defendant's "prior convictions are relevant to the sentencing decision," the Court "must focus on the principal felony—the felony that triggers the life sentence—since [the defendant] already has paid the penalty for each of his prior offenses." *Helm*, 463 U.S. at 296 n.21; *see also Coker*, 433 U.S. at 599 ("Coker had prior convictions for capital felonies—rape, murder, and kidnaping—but these prior convictions do not change the fact that the instant crime being punished is rape not involving the taking of a human life").

Given these principles, the State can justify Mr. Ewing's sentence only if it can show that the sentence is not grossly disproportionate to his theft of the golf clubs, enhanced by the fact of his recidivism. This the State fails to do. California has imposed a sentence far in excess of any penalty that could reasonably be considered a "stiffened" or enhanced penalty for Mr. Ewing's present crime of grand theft. Mr. Ewing's minimum sentence of twenty-five years is more than eight times longer than the maximum term (three years) otherwise available for the offense of grand theft. As petitioner noted in his opening brief, this is not an "enhancement" but a radical transformation of petitioner's sentence; it far exceeds the enhancement that could be imposed for other, far more

serious aggravating factors, such as inflicting great bodily injury upon the victim. *See Pet Br.* 31-32.

The eight-times "enhancement" noted above understates the true impact of the Three Strikes law on petitioner's sentence, because it compares a minimum to a maximum. In reality, petitioner's *maximum* sentence has been "stiffened" from the non-Three-Strikes absolute maximum of three years in prison to life imprisonment. Conversely, his *minimum* term of incarceration has been enhanced from the first-time offender's minimum of eight months [6] to twenty-five years. The increase from a maximum of three years in prison to a maximum of life imprisonment cannot be translated into a ratio; the increase from a minimum of eight months incarceration to a minimum of twenty-five years imprisonment results in an extraordinary ratio of 37.5 to 1 that bears no rational relationship to the severity of the underlying crime.[7] *Cf. BMW*, 517 U.S. at 581; Amicus Curiae Brief of National Association of Criminal Defense Lawyers, filed in *Lockyer v. Andrade*, No. 01-1127, at 18-20, 22-23.

The State also fails to come to grips with the extraordinary increase in Mr. Ewing's sentence as illustrated by a comparison of his sentence for the current grand theft to the sentence imposed for his prior convictions themselves. For those, Mr. Ewing received the maximum sentence available,

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[6] A first-time offender who shoplifted three golf clubs and was convicted of grand theft, if denied probation and sentenced as a misdemeanant, could receive a maximum sentence of one year in the county jail, Cal. Penal Code § 489(b), which could be reduced by one-third through good conduct/work credits to eight months, Cal. Penal Code § 4019. If sentenced as a felon and denied probation, the first-time offender would likely be sentenced to the low term of the grand theft sentencing triad, sixteen months in prison, Cal. Penal Code §§ 489(a), 1170(b), which could be reduced by one-half through good conduct/work credits to eight months, Cal. Penal Code §§ 2930-2933.

[7] To counsel's chagrin, this ratio was misstated in Petitioner's Brief on the Merits, page 23, as 19-1.

which amounted to 9 years, 8 months in prison. The State never explains why, when the Constitution concededly bars the State from re-sentencing Mr. Ewing to serve that maximum term again for those crimes, it nevertheless permits the State to rely on them to increase his sentence for stealing three golf clubs to a minimum of twenty-five years, more than two and a half times his maximum sentence for the prior, more serious crimes themselves.

Thus, when Mr. Ewing's grand theft sentence is analyzed to determine how much it has been enhanced because of his prior record, it is clear that his prior convictions proved to be not just "relevant to the sentencing decision." *Helm*, 463 U.S. at 296 n.21. Rather, unlike the prior criminal conduct in *Witte*, Mr. Ewing's prior convictions *were* the "'tail which wag[ged] the dog'" of the sentencing decision. *Witte*, 515 U.S. at 403 (quoting *McMillan v. Pennsylvania* 477 U.S. 79, 88 (1986)). In that sense, the State is right that "[t]his is, primarily, a case about felony recidivism." Resp. Br. 18. The problem for the State is that felony recidivism alone cannot justify the extraordinary transformation, rather than mere enhancement, of petitioner's sentence.

The State's heavy reliance on petitioner's recidivism is also inconsistent with the justification this Court has provided for permitting enhanced sentences based on a defendant's prior record. The reason that prior convictions are "relevant to the sentencing decision," *Helm*, 463 U.S. at 296 n.21, is that the present offense is "an aggravated offense, because a *repetitive* one." *Gryger*, 334 U.S. at 732 (emphasis added.) In the case of recidivists, it is "the *repetition* of criminal conduct [that] aggravates their guilt and justifies heavier penalties when they are again convicted." *Graham v. West Virginia*, 224 U.S. 616, 623 (1912) (emphasis added); *see also Moore v. Missouri*, 159 U.S. 673, 677 (1895) (a recidivist statute "imposes a higher punishment for the same offense upon one who proves, by a second or third conviction, that the former

punishment has been inefficacious in doing the work of reform for which it was designed" (quoting *Plumbly v. Commonwealth*, 2 Met. (Mass.) 413)).

Thus, a recidivist receives an enhanced punishment because he has not "learned his lesson" and has broken the law again. In assessing the effect of the defendant's recidivism, the salient facts are his reoffending and the nature of his new offense. Where, as here, the present offense is markedly less serious than the prior offenses, the defendant *has* "learned his lesson" to some extent, and the fact of his reoffending, taken in this light, is less serious. On the other hand, if the present offense had been more serious than the prior crimes, the defendant's incorrigibility would be greater and his reoffending more serious.[8]

The District Attorney of Los Angeles County, the state's most populace county, has effectively conceded the point by now recognizing that, "unless used judiciously, [the Three Strikes law] has the potential for injustice and abuse in the form of disproportionately harsh sentences for relatively minor crimes." Los Angeles County District Attorneys's Office, Three Strikes Policy, dated December 19, 2000.[9] Accord-ingly, the office's policy is that, where the current offense is not a serious or violent felony or a large scale drug offense, there is a rebuttable presumption that the case will be treated as a "two strike" case, with a doubling of the sentence, rather than a minimum of twenty-five to life.[10] *Id.* The new

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[8] Paradoxically, although it would seem beyond dispute that a defendant who commits increasingly violent crimes should receive greater punishment, California law produces the opposite result. Because of its requirement that the first two strikes be violent or serious crimes, but not the third strike, a defendant whose criminal activity is escalating in violence is punished less severely than a defendant who has turned from violent crimes and committed a property offense. *See* Pet. Br. 25-26.

[9] *See* L.A.D.A. Website at http://da.co.la.ca.us/mr/2000/ 121900b.htm.

[10] Indeed, amicus California District Attorneys Association sponsored a bill, as an alternative to the present Three Strikes law, that would have

policy, which post-dates Mr. Ewing's sentencing, further underscores the grossly disproportionate nature of his sentence for shoplifting.

The State also attempts to defend Mr. Ewing's sentence as constitutional by asserting that the Three-Strikes law has been highly effective in reducing crime. The effectiveness of a state's sentencing policy, however, is irrelevant for Eighth Amendment purposes, just as the effectiveness of a police department's search-and-seizure policy is irrelevant to its constitutionality. *E.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Cruel, unusual, or excessive punishment, even if highly effective at deterring crime, is still unconstitutional.

There are, moreover, serious questions whether California's claims of success are accurate. California's crime rate has not fallen any more than the crime rates of states that have no comparable three-strikes law.[11] Similarly, a county-by-county comparison of crime rates in California from 1994-1997 revealed that more vigorous enforcement of the Three-Strikes law did not correlate with greater declines in crime.[12]

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required that the third strike be a violent or serious offense. *See* Amicus Brief of Families to Amend California's Three Strikes, *et al.*, filed in *Lockyer v. Andrade*, No. 01-1127, at 6.

[11] Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 Stan. L. Pol'y Rev. 65, 66 (1999).

[12] *Id.*, at 67-68, 70. The six counties that most aggressively applied the three-strikes law averaged a *lesser* decline in violent crime and overall index crimes than the six counties that were the least aggressive. Moreover, the county that least invoked three-strikes sentencing, San Francisco, experienced a much *greater* decline in several different crime rates than the county with the greatest enforcement, Sacramento. Males, at 67-68, 70 (citing California Crim. Justice Stat. Ctr., Cal Dep't of Justice, California Criminal Justice Profiles (annual), at tbl.22 (1994-1997)).

Finally, the State urges that Mr. Ewing may constitutionally be incarcerated for life because of his supposed violent "propensities" and likelihood of committing future crimes. But as more fully developed in the amicus brief of the National Association of Criminal Defense Lawyers, filed in *Lockyer v. Andrade*, No. 01-1127, a person may not constitutionally be imprisoned solely on the grounds of his criminal propensities or projected future crimes. NACDL *Andrade* Amicus Br. 14-17. Any prediction of future dangerousness is fraught with uncertainty. For example, as conceded by respondent's amicus Criminal Justice Legal Foundation, one study that attempted to replicate the predictive powers of the California Three Strikes law found that the law produced, on a "very conservative" basis, a "false positive" rate of one-third, *i.e.*, that one-third of those predicted to commit a future violent offense did not do so.[13] When a person's liberty is at stake, a one-third "error rate" is unacceptable.

III. BOTH INTRAJURISDICTIONAL AND INTERJURISDICTIONAL COMPARISONS CONFIRM THE GROSS DISPROPORTIONALITY OF PETITIONER'S SENTENCE

The State fails to rebut not only petitioner's threshold showing of gross disproportionality, but also petitioner's confirmation of that showing through intra- and interjurisdictional comparisons. The State's principal claim is that such comparisons are not "ever really appropriate," and should be limited to "determining whether the challenged sentence is so aberrational as to represent a manifest or virtual malfunction of the legislature's intended sentencing scheme." Resp. Br. 37. Amicus United States similarly proposes to

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[13] CJLF Amicus Br. 21, citing Burt et al., *Three Strikes and You're Out: An Investigation of False Positive Rates Using a Canadian Sample*, 64 Fed. Probation, No. 2, pp. 3, 4 (June 2000).

narrow the constitutional inquiry to whether "the sentence departs radically from sentences imposed on similarly-situated defendants in the same situation." U.S. Amicus Br. 24.

These further attempts to constrict the gross disproportionality standard find no support in the Court's precedent. *See, e.g., Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring); *Helm*, 463 U.S. at 291-92; *Weems v. United States*, 217 U.S. 349, 380-81 (1910). Intra- and inter-jurisdictional comparisons in this case, if done consistently with this Court's precedent, confirm that Mr. Ewing's sentence is grossly disproportionate to his offense of stealing golf clubs.

A. Intrajurisdictional Comparison

The Court has explained that the scope of an intrajurisdictional comparison is broader than what the State advocates here: "[I]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment may be excessive." *Helm*, 463 U.S. at 291. A comparison of Mr. Ewing's sentence with other sentences imposed in California shows its gross disproportionality, *i.e.*, that Mr. Ewing "has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes." *Helm*, 463 U.S. at 299.

First, the only California defendants who receive a sentence as harsh as Mr. Ewing's, besides other "three-strikers," are those who have committed the most violent and/or reprehensible crimes, such as first degree murder, Cal. Penal Code § 190(a). *See* Pet. Br. 27-28. The State nowhere explains why a shoplifter, no matter his record, warrants punishment comparable only to that meted out for extraordinary crimes.

Second, California punishes many crimes that are far more serious than Mr. Ewing's, such as mayhem, torture,

kidnapping, rape, and use of a weapon of mass destruction, with sentences that are far less severe. *See* Pet. Br. 28; FAMM Br. 10-11. Again, the State fails to explain how recidivism transforms shoplifting into a crime more serious than these horrible crimes.

Third, the Three Strikes law imposes penalties that are much harsher and more disproportionate than under California's other recidivist statutes. Pet. Br. 28. For example, a felon who has a prior serious or violent offense will have his sentence for the current offense doubled, Cal. Penal Code § 667(e)(1), a reasonable enhancement for his reoffending. Thus, if Mr. Ewing were a "two-striker," he would have faced a sentence of three to six years. The State cannot explain how one additional prior strike increases the blameworthiness of his shoplifting sufficiently to justify a sentence of life imprisonment, with no parole eligibility for twenty-five years.

Finally, the law imposes an enhancement for recidivism that is far beyond that imposed for other, at least equally serious, aggravating factors. Pet. Br. 24. The State does not explain why committing grand theft while armed with a firearm or while using a deadly weapon merits no more than a one-year enhancement, Cal. Penal Code § 12022, but Mr. Ewing's recidivism warrants an enhancement of at least twenty-two years.

Amicus United States would dismiss the intrajurisdictional comparison proffered by petitioner on the grounds that it "assumes a penal code must assign central importance to retribution" as opposed to other penological goals, and by speculating that California's sentences for non-Three-Strike offenders reflect the adoption of a "rehabilitative" rather than retributive penalty scheme. U.S. Amicus Br. 10, 25; *see also* States Amicus Br. 16. It is the United States, however, that errs in its assumption. California has explicitly said that its penal code is grounded in a philosophy of retribution. Penal

Code section 1170(a)(1) states: "The Legislature finds and declares that the purpose of imprisonment for crime is *punishment*." (Emphasis added.) The Three Strikes law itself echoes this determination, stating that the legislative intent in enacting the measure was "to ensure longer prison sentences and greater *punishment* for those who commit a felony and have been previously convicted of serious and/or violent felonies." Cal. Pen. Code § 667(b)(emphasis added).

Thus, Mr. Ewing's sentence under the Three Strikes law can legitimately be compared to other California sentencing provisions. That comparison confirms that Mr. Ewing's sentence is grossly disproportionate to his commitment offense of stealing three golf clubs. Indeed, in providing that any felony conviction, regardless of its seriousness, will trigger a Three Strikes sentence of life imprisonment with parole eligibility foreclosed for at least twenty-five years, the "Three Strikes" law transgresses California's own policy determination that, just as "the purpose of imprisonment for crime is punishment," "[t]his purpose is best served by *terms proportionate to the seriousness of the offense*." Cal. Penal Code § 1170(a)(1) (emphasis added).

B. Interjurisdictional Analysis

Respondent does not dispute that, as explained in petitioner's opening brief, California is among only a handful of states in which Mr. Ewing would have been eligible to receive a life sentence, and that it is currently the only state in the nation where he would be subject to a mandatory sentence of life, with a minimum of twenty-five years in prison. Respondent disputes only one specific aspect of petitioner's interjurisdictional analysis: where we demonstrated that Mr. Ewing would be subject to a life sentence under the current laws of only five states other than California, respondent and amicus United States contend he would be so eligible in two others: Idaho and West Virginia. Resp. Br. 44-45; U.S. Amicus Br. 27-28. They erroneously assume, however, that

Mr. Ewing's Ohio conviction was for grand theft. *See* Resp. Br. 1, 44-45; *see also* CDAA Amicus Br. 19, 22. In fact, Mr. Ewing was convicted of the lesser included offense of theft, a misdemeanor of the first degree. Appendix (certified copy of entry of plea and sentencing). Thus, Mr. Ewing would not have been subject to a life sentence under either the Idaho or West Virginia statutes.

As this Court explained in *Harmelin* and *Helm*, an initial judgment of gross disproportionality can either be bolstered or rebutted by comparing "'the sentence imposed on the defendant with the sentences imposed for commission of the same crime in other jurisdictions.'" *Harmelin*, 501 U.S. at 1005 (Kennedy, J., conc.) (quoting *Helm*, 463 U.S. at 291-92). With the sole exception of its erroneous contention regarding how Mr. Ewing would have been sentenced in Idaho and West Virginia, respondent avoids the relevant analysis, and instead offers three observations that bear, at best, a tenuous relation to the pertinent inquiry.

First, relying on *Atkins v. Virginia*, 536 U.S. ___, 122 S.Ct. 2242 (2002), respondent claims that California's law passes constitutional muster because twenty-four other states have some form of three-strikes law and because no consensus has developed repudiating California's approach as "intolerable." Resp. Br. 44, 48. Citing a six-year-old study, respondent asserts that as many as twenty-four other states in the last decade have adopted "'Three Strikes'-type legislation." Resp. Br. at 44 (citing National Institute of Justice, "'Three Strikes and You're Out': A Review of State Legislation," 7-9 (Sept. 1997)). Respondent's observation is so broad as to be meaningless. In *Atkins*, this Court did not simply ask how many states generally authorized the death penalty, but rather specifically analyzed how many states barred the execution of the mentally retarded and, of the states that permitted such executions, whether the practice was uncommon. 122 S.Ct at 2249. Similarly, in *Helm*, the Court did not ask how many states had generally adopted recidivist laws, but rather

whether Helm "could" have received elsewhere the same sentence that was imposed in South Dakota and further whether those states that authorized the same maximum penalty also permitted parole. 463 U.S. at 299-300 & n. 27. In this case, the pertinent and specific answer to the interjurisdictional question is not that about half of the states have adopted some form of "'Three-Strikes' type" legislation over the last decade, but rather that Mr. Ewing would today be subject to a life sentence in only five other jurisdictions,[14] that in those jurisdictions he would be eligible for parole much sooner than in California, and that no other jurisdiction would require a mandatory minimum sentence of twenty-five years to life.

Second, what respondent characterizes as "details" of sentencing practice—parole, prison credits, and minimum terms of imprisonment—that should not be considered in the interjurisdictional comparison have, in fact, played a central role in this Court's analyses. The case principally relied on by respondent, *Rummel*, for example, explained "because parole is an established variation on imprisonment of convicted criminals, a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." 445 U.S. at 280-81. The *Rummel* court also stressed Texas' liberal policy of granting good time credits. *Ibid.* Similarly, in performing

[14] Respondent asserts that Montana should be added to this group of states because Mr. Ewing would be subject to a "mandatory term of ten-to-100 years." Resp. Br. 44. The minimum sentence Mr. Ewing would face in Montana would be five years, not ten. *See* Mont. Code Ann. § 46-18-502(1) (he was not a persistent felony offender at the time of his previous felony convictions and therefore would not be subject to § 46-18-501(2)). Moreover, the facial harshness of Montana's law is ameliorated by the fact that there are six exceptions to the mandatory minimum sentence, *id.* § 46-18-222, and a persistent felony offender, like all other prisoners, is parole eligible after serving one-fourth of the minimum sentence. *Id.* § 46-23-201(2).

the interjurisdictional analysis in *Helm*, the Court noted that while Nevada courts were authorized to impose a life sentence without the possibility of parole, a life with possibility of parole sentence was also permitted, in which case, the defendant would have been parole eligible after ten years. 463 U.S. at 300 n. 27. There is no reason to abandon examination of these objective factors that significantly affect the actual punishment imposed on Mr. Ewing and that play a critical role in evaluating the relative harshness of the punishment that would be imposed in other jurisdictions.

Finally, in light of our unrebutted demonstration that California's actual punishment of Mr. Ewing is so much harsher than the actual punishment he would likely face in any other jurisdiction in the nation, respondent wanly concludes that the fact California's law might be harsher than those of every other state would not "by itself" mean that it is grossly disproportionate. Resp. Br. at 48. True, but that fact does confirm what is otherwise evident, *i.e.*, no one, regardless of their past record, should be sentenced to a maximum of life and a minimum of twenty-five years for shoplifting three golf clubs.

Perhaps recognizing the excessiveness of the twenty-five-to-life sentence in relation to the crime being punished, stealing three golf clubs, respondent and its amici attempt to demonize Mr. Ewing, labeling him a "one-man crime wave" (CJLF Amicus Br. 17, 24) and "a bad man with a bad record" (CDAA Amicus Br. 28). Yet, contrary to the claims of amici, the only felonies on Mr. Ewing's prior record are the strikes sustained in the 1993 proceeding.[15] Mr. Ewing's 1984 Ohio

[15] As we acknowledged in our opening brief, Mr. Ewing brandished a knife in one of the burglaries (also charged as a robbery), but no one suffered physical injury in any of the 1993 offenses. In fact, although amicus United States repeatedly speaks as if he were a violent person, *e.g.*, U.S. Amicus Br. 9, 15, 22, whatever his criminal record, Mr. Ewing has never physically injured anyone.

conviction was not for felony grand theft, but for misdemeanor theft; as recognized by amicus United States (page 5 n.3), his 1988 auto theft conviction is a misdemeanor for all purposes. *See* Cal. Penal Code § 17(b)(3). Thus, a fair and accurate reading of Mr. Ewing's record reveals a relatively minor criminal history—one in which Mr. Ewing, unlike Rummel, served but a single prison term.

The most persuasive evidence belying the hyperbolic mischaracterizations of Mr. Ewing's record is the sentencing proceeding in this case. After examining Mr. Ewing's record and hearing the arguments of counsel, the sentencing judge concluded that there wasn't "a real pattern of violent crimes," and the threat Mr. Ewing posed was only "a threat for theft offenses." JA 14.

When the Court focuses, as it must, on the triggering felony, *Helm*, 463 U.S. at 296 n.21, it finds a man who, beset by AIDS, drug addiction and loss of sight in one eye, and having recently lost his mother and brother, JA 10-13, bungled his way through shoplifting three golf clubs, talking to the clerk not once but three times, disregarding the directions to the driving range the clerk provided him, and then noticeably limping out the door in the opposite direction. Mr. Ewing is anything but the master criminal respondent and its amici portray.

CONCLUSION

The Court should hold that the sentence of a minimum of twenty-five years imprisonment and a maximum of life imposed on Mr. Ewing for shoplifting three golf clubs constitutes cruel and unusual punishment under the Eighth Amendment, should vacate the judgment below, and should remand for further proceedings, including resentencing.

Respectfully submitted,

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APPENDIX

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

January Term, 1984
Case No.: 84 CR-11-3304
Judge F. Williams

STATE OF OHIO,
Plaintiff,

vs.

GARY A. EWING,
Defendant.

Indictment for: Theft (§ 2913.02 R.C.)
(1 count)

ENTRY

In the Court of Common Pleas for the County of Franklin, State of Ohio, during the term begun on January 2, 1985.

On December 19, 1985, came the Prosecuting Attorney on behalf of the State of Ohio, the defendant being in court in custody of the Sheriff and the Court being fully advised in the premises that the defendant was in Court and being represented by counsel, Sharon Pfancuff.

The defendant, on December 19, 1985, pleaded guilty to a stipulated lesser included offense of Theft, a violation of Section 2913.02 R.C., a misdemeanor of the first degree.

The Court afforded Counsel an opportunity to speak on behalf of the defendant and addressed the defendant personally affording him an opportunity to make a statement in his own behalf and present information in mitigation of punishment.

The Court has considered the criteria for probation pursuant to section 2951.02 of the Ohio Revised Code and ORDERS that the execution of the confinement portion of the sentence, to wit: 6 months in the Franklin County Correction Center be suspended and the defendant be placed on probation in the charge of Tom Studebaker, Probation Officer. The suspension is to continue from this date, December 19, 1985, for a period of 3 years upon the following terms and conditions, to wit: Defendant pay restitution in the amount of $850.00 and a fine in the amount of $300.00. If he violates any one or more of the terms and conditions set out above, the suspension shall be revoked and this period of probation terminated; otherwise, the defendant shall be released from the custody of this Court upon completion of the probation period. The defendant shall also pay the costs of this prosecution and abide by the rules and regulations of the Probation Department.

/s/ Frederick T. Williams
FREDERICK T. WILLIAMS
Court of Common Pleas
Franklin County, Ohio

IGRC (6m) FCCC/Prob 3y/
costs/rest/fine

[SEAL]